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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 745 14

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

GEORGE H. BOND,
EDWARD SCHOENECK,
Counsel for Appellant.

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No. 745

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Petitioner-Appellant,

vs.

CARROLL E. MEALEY, JOHN F. HENNESSEY AND JOSEPH M. MESNIG, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents

STATEMENT AS TO JURISDICTION

The Petitioner-Appellant, above named, respectfully submits the following Jurisdictional Statement pursuant to Rule 12:

1. The Statutory provision which the Petitioner-Appellant believes sustains the jurisdiction of this Court is Section 237(a) of the Judicial Code of the United States (28 U. S. C. A. Section 344-a), and the statute of New York State, the validity of which is involved, is Section 186-a of the Tax Law of the State of New York, a verbatim copy of said section being attached hereto and made a part of this Jurisdictional Statement as if set forth in this para-

graph. The date of the final order and final judgment sought to be reviewed in the above cause is July 23, 1946, and the date upon which the application for the appeal is presented is October 21, 1946.

2. The nature of the cause and the rulings of the Court below were and are such as to bring this case within the jurisdictional provisions hereinbefore set forth, as is set forth more fully hereinafter.

3. That by a petition, dated and verified February 16, 1943, the petitioner before the Supreme Court, State of New York, Albany County, prayed for relief and for Court review of a determination made by the respondents, constituting the State Tax Commission of the State of New York, and requested that the Court direct the respondents to cancel an assessment, purportedly made under the wording of Section 186-a of the Tax Law of the State of New York, in its entirety or, in the alternative, reduce the sum by 42.53%; that said petition set forth the following allegations: That the petitioner was engaged in business as a common carrier, and that it operated omnibuses both within and without the State of New York, and that additional taxes were assessed upon the gross income of the petitioner from sales and transportation services in interstate commerce originating and terminating within the State of New York and consumed and used partly within the States of New Jersey and Pennsylvania, that the petitioner had established by competent proof before the Department of Taxation & Finance upon a hearing held pursuant to a petition filed with such Department, that the additional tax was based upon sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, and that the revenue from such services for the month of July, a month chosen

on the basis of a stipulation attributable to the mileage consumed in the State of New York was 57.47% of the total revenue received for such services, that the respondents refused to cancel or reduce the assessment but affirmed the same by its decision dated January 27, 1943; that the said petition specifically set forth that the determination of the Commission made January 27, 1943 was contrary to statute, was unconstitutional, and was illegal and erroneous in that any assessment upon income of the petitioner from the sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, was illegal and void and was not authorized by statute, and that if any portion of the income was subject to tax under Section 186-a of the Tax Law, the income from services consumed and used within the States of New Jersey and Pennsylvania must be eliminated therefrom.

4. That in its original petition before the Department of Taxation & Finance, petitioner alleged that the additional taxes were being assessed upon gross income of the petitioner from sales of transportation services in interstate commerce originating and terminating within the State of New York but consumed and used partly within the States of New Jersey and Pennsylvania, and that any assessment upon such income was not authorized by statute and was illegal and void.

5. That upon the petition filed in the Supreme Court, State of New York, Appellate Division, Third Department, a return was filed by the respondents which denied that the transportation referred to in the petition constituted interstate commerce, and said return alleged that the tax referred to in the petition and affirmed by the Commission's determination was lawfully assessed. (The references to

the petitioner's petition in the Supreme Court, Appellate Division, Third Department (originally before the Supreme Court, County of Albany, but transferred by subsequent order under the provisions of Section 1296 of the Civil Practice Act) are found in the printed record on appeal before the Court of Appeals at pp. 5-10; to the petitioner's petition before the Department of Taxation & Finance at pp. 25-26; to the answer and return of the respondents at pp. 11-13.)

6. The Supreme Court, Appellate Division, after hearing oral argument, handed down its opinion and decision dated November 10, 1943, a copy of which is appended hereto and made a part hereof as if fully set forth in this paragraph, and an order of affirmance was entered September 13, 1943. (References to the proceedings of the Supreme Court, Appellate Division, are found at pp. 60-66 of the printed record on appeal in the Court of Appeals.) The opinion of the Supreme Court, Appellate Division, which appears in the Official Reporter at 266 A. D. 648, set forth that your petitioner argued that if receipts from the sale of utility services for use partly within and partly without the State are taxable under Section 186-a of the Tax Law, when the journey originates and terminates in New York State, then the tax must be limited to the revenue attributable to the mileage in New York State, "* * * otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution" (fols. 193-194 of the printed record on appeal in the Court of Appeals). The Supreme Court, Appellate Division, further added that the "journeys", referred to in the opinion, have been held "not to be interstate commerce" (fol. 195 of the printed record on appeal in the Court of Appeals), citing the cases of *Lehigh Valley Railway* v. *Commonwealth of Pennsylvania*, 145 U. S. 192; *People ex rel. Cornell Steamboat Com-*

pany v. *Sohmer*, 235 U. S. 549. The Supreme Court, Appellate Division, concluded, with reference to the argument of the petitioner, as follows:

> "In the light of the federal decisions, we see no merit to the contention of petitioner that Section 186-a of the Tax Law, as above construed, is a violation of the interstate commerce clause of the Federal Constitution" (fol. 197 of the printed record on appeal in the Court of Appeals).

That Court further stated that since the tax was measured by gross income, it was not a burden upon the particular business of the petitioner (fol. 198 of the printed record on appeal in the Court of Appeals).

7. The petitioner thereafter applied for leave to appeal to the Court of Appeals before the Appellate Division of the Supreme Court and such leave was denied, 267 A. D. 841, but thereafter, on March 2, 1944, the Court of Appeals for the State of New York issued an order granting leave to appeal to the Court of Appeals (fols. 175-177 of the printed record on appeal in the Court of Appeals; 292 N. Y. 723).

8. The cause was argued before the Court of Appeals for the State of New York on June 6, 1946, and the cause was decided on July 23, 1946, and the Court of Appeals handed down an opinion on that date (official citation not yet available), a copy of which is appended hereto and made a part hereof as if fully set forth in this paragraph; that the Court of Appeals stated in such opinion:

> "There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Lehigh Valley case, supra; People ex rel. Cornell Steamboat Co., 235 U. S. 549; Ewing *vs.* Leavenworth, 226 U. S. 464.)"

That on October 15, 1946, upon application of your petitioner, the Court of Appeals denied a motion for re-argument but amended the remittitur by adding thereto the following statement:

> "A question under the Federal Constitution was presented and passed upon by this Court, viz. whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution."

9. That the questions involved in this cause are substantial, and the issues involve matters of far-reaching effect, and it is only by the determination of the Supreme Court of the United States that the issues can be determined conclusively and finally, not alone as they affect your petitioner but all those engaged in similar occupation and in operations which involve the transportation of passengers across State lines; that the questions involved are substantial is substantiated by the fact that the Court of Appeals for the State of New York granted leave to appeal to that Court, based in part upon the application of the petitioner, which pointed out that the geographical location of New York City is such that a large volume of traffic between that city and the central and western parts of the State of New York passes through New Jersey and Pennsylvania, and that no case had been found decided by the highest Court of the State of New York interpreting the particular provision of Section 186-a of the Tax Law, and that a decision in this matter, affecting as it does such a large volume of business, involves a question of law which ought to be reviewed.

10. That your petitioner is of the firm belief that if the present decision of the Court of Appeals in the case at bar

shall stand, without review, then the decisions of the Supreme court of the United States in *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192, and *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617 and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, will, in effect, be overruled by the decision of the Court of Appeals; whereas if a further review be made, a determination by the Supreme Court of the United States on the question will it is believed, result in a reversal of the judgment below and the sustaining of the previous decisions of the Supreme Court of the United States, or, in the alternative, if the decision of the Supreme Court of the United States on this matter shall be adverse to your petitioner, then the Supreme Court of the United States will have made the determination that its own prior decisions are to be overruled.

11. That the issues raised in this cause, as set forth in the foregoing statements, are of tremendous importance not alone to the petitioner, but to all those engaged in the business of transportation, and in the absence of a final determination by ultimate authority, as the Supreme Court of the United States, the obligations and responsibilities of persons such as the petitioner are left undefined, dependent upon several independent litigations under the several Courts of the United States.

12. That the issues raised in this cause, as set forth in the foregoing statements and as further appear from the opinion of the Court of Appeals for the State of New York in the case at bar, involve questions which are substantial; that Court of Appeals in the opinion below, sought to distinguish the cases upon which the appellant relied, of *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192; *United State Express Co.* v. *Minnesota*, 223 U. S. 335; *State of Minnesota* v. *United States Express Co.*, 114 Minn. 346;

Hanley v. *Kansas City So. Ry. Co.*, 187 U. S. 617; that the net effect of the Court of Appeals opinion is that the Supreme Court cases, just cited, are not authorities for the appellant's position. It was, and is, the view of your petitioner that in the Supreme Court cases just cited, the Supreme Court of the United States has clearly expressed at least a substantial doubt as to the power of a State to tax gross receipts from the transportation business of the character involved in the case at bar, so far as the tax might have been applied to receipts from mileage without the State; that such was the interpretation the Supreme Court of the State of Minnesota placed upon the United States Supreme Court's decision in the cases of *Lehigh Valley Ry.* v. *Pennsylvania*, 145 U. S. 192, and *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617, for in the case of *State of Minnesota* v. *United States Express Co.* (114 Minn. 346), the Court stated with respect to this identical problem:

> "We interpret the decision (The Lehigh Valley decision) as allowing a recovery of taxes upon that proprotion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce, and we adopt and apply it to this case."

that the United States Supreme Court agreed with this decision of the Supreme Court of Minnesota and stated:

> "As to such shipments, the Supreme Court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 1 Inters. • • • An examination of that case shows that it is

decisive of the present one on this point, and we need not further discuss this feature of the case."

(223 U. S. 335); that the case of *People ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, which involved a different taxing statute and upon which the Court of Appeals below relied is readily distinguishable, because in that case the taxpayer failed to show, though the opportunity was afforded to it before the State Tax Commission, the portion of the revenue attributable to its towings outside of the State of New York. On the basis of the *Lehigh Valley* case (145 U. S. 192) such a showing was a prerequisite to the taxpayer's obtaining relief; that in the case at bar, there is a specific finding by the New York State Tax Commission that the petitioner received from bus transportation originating and terminating in the State of New York but traversing without the State of New York for some portion of the journey, the sum of $84,412.31 (for the month of July, 1937, a month chosen as a basis for decision —Folio 130 of the printed record on appeal in the Court of Appeals), and that 57.47 per cent of the total mileage of such journeys was traversed within the State of New York and 42.53 per cent of such total mileage was traversed without the State of New York (Folio 163 on appeal in the Court of Appeals).

WHEREFORE, the Petitioner-Appellant prays for the allowance of an appeal from the Court of Appeals for the State of New York, the highest Court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final order and final judgment of the Court of Appeals for the State of New York may be examined and reversed; and your Petitioner-Appellant further prays that on account of the errors hereinbefore assigned, the final order and judgment of the

Court of Appeals for the State of New York, dated July 23, 1946, in the above-entitled cause be reversed and judgment entered in favor of this Petitioner-Appellant.

Dated October 21, 1946.

GEORGE H. BOND,
EDWARD SCHOENECK,
Counsel for Appellant.

APPENDIX "A"

COURT OF APPEALS

CENTRAL GREYHOUND LINES, INC., of New York, *Appellant*,

v.

CARROLL E. MEALEY, et al., Constituting the State Tax Commission, Respondents

Decided July 23, 1946

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 13, 1943, in a proceeding under Article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of the State Tax Commission affirming an assessment of an additional tax (entitled "Emergency Tax on the Furnishing of Utility services").

Charles A. Schoeneck for appellant.

Nathaniel L. Goldstein, Attorney-General (John C. Crary, Jr., and Wendell P. Brown of counsel), for respondents.

CONWAY, J. There is presented for construction a part of section 186-a of the Tax Law. That section imposes an emergency tax of 2% upon the gross income of every utility doing business in this state which is subject to the supervision of the State Department of Public Service and which has an annual gross income in excess of $500. The petitioner is a corporation engaged in business as a common carrier by omnibus and subject to the supervision of the Public Service Commission. It operates omnibuses, both within and without the state. Subdivison 2, section (a) provides that the word "utility" includes every person subject to the supervision of the state department of public service with certain exceptions not material here. Subdivision 2, section (b) provides that the word "person" includes corporations.

Subdivision 2, section (c) provides: "The words 'gross income' mean and include receipts received in or by reason of any sale * * * made or service rendered for ultimate consumption or use by the purchaser in this state * * *."

The State Tax Commission included within petitioner's gross income, for the purpose of computing the emergency tax, receipts from sales of tickets for certain journeys which originated and terminated in New York State but which went through New Jersey and Pennsylvania. At the hearing before the Commission, the proof was limited to figures for July, 1937, with the stipulation that the result should be applicable to all the assessments for which application for revision had been filed.

The regular route of the busses of this company traveling between New York City and cities and villages in upstate New York is through New Jersey and Pennsylvania. A passenger who wishes to go to New York City from Buffalo, for instance, buys a single ticket marked "Buffalo to New York City". The bus travels within this State from Buffalo to Elmira; en route from Elmira to Towanda, Pennsylvania, it crosses the Pennsylvania State line and continues through Pennsylvania to Scranton. En route from Scranton, it crosses the New Jersey State line and continues through New Jersey to the Holland or Manhattan Tunnel and into New Jersey City.

Petitioner's Exchange 7 (pp. 45-51 of the record), entitled "Receipts from Interstate Business Which Originates and Terminates in New York State", breaks down the total receipts of July, 1937, for journeys originating and terminating in New York State into two figures: $84,431 which represents receipts for total mileage covered on these trips, and $48,508.97 which represents receipts for mileage covered within New York State on these trips. Receipts for journeys which begin at a point in New York State and terminate at a point outside of the State, or the reverse, are not included in this controversy.

The contention of the petitioner at the hearing before the Commission was that gross income to be taxed under this statute, if any, is limited to receipts representing mileage covered within New York State. The assessment of $1,688.24 made by the Commission on the basis of total

receipts for these journeys was affirmed upon the hearing. It was stipulated that the Commission found that (1) 42.53% of the total mileage of such journeys was traversed without the State, and 57.47% within the state; (2) that § 186-a of the Tax Law applies to bus transportation originating and terminating in this State; (3) that § 186-a so construed violates neither the Federal nor State Constitutions; and (4) that the receipts from such transportation should not be prorated according to the mileage traversed in and out of this State.

Petitioner advances two arguments. The first is that the language of section 186-a includes within "gross income" receipts for sales made or service rendered for ultimate consumption or use by the purchaser in this State, but does not include sales made or service rendered for consumption or use partly within and partly without the State. Petitioner argues that the word "ultimate" has no reference to the point of destination in transportation and may therefore be disregarded. It explains that that word was used in order to make the tax applicable to the resale of utility services by the original purchaser of such service (for instance, submeters), and at the same time to avoid pyramiding of taxes which would result from taxation of both wholesale and retail sales. There seems no reason to doubt this explanation of the word "ultimate" so far as it refers to submeterers. Indeed, the "Declaration of legislative intent" which accompanied the amendment of section 186-a in 1941 (L. 1941, c. 137, § 1) states: "It was intended to include persons and corporations which were directly in competition with ordinary utilities, such as, landlords and submeterers, who buy their services from other utilities and, in turn, resell such services. For that reason the tax was imposed on receipts from sales to ultimate consumers. Receipts from the sale of such utility services to submeterers were not taxed, but receipts of submeterers from their own customers were intended to be taxed."

However, that aspect of the use of the word "ultimate" does not render it necessary to ignore the word entirely in relation to transportation. Nor do I think the Legislature intended such a result. Subdivision 1 of the section dis-

tinguishes between utilities subject to the supervision of the department of public service and utilities not so subject. Submeterers and landlords are not subject to the supervision of the department of public service, but they are taxable under this statute. (Matter of Lacidem Realty Corp. *v.* Graves, 228 N. Y. 354.) A 2% tax of its "gross income" is imposed on every utility subject to the supervision of the department of public service; a 2% tax is also imposed on the "gross operating income" of "every other utility doing business in this state." Subdivision 2, section (c) defines "gross income" (which, as used in subd. 1, refers only to income of utilities under the supervision of the department, to which class petitioner belongs) as including receipts for "any sale * * * made or service rendered for ultimate consumption or use in this state." Subdivision 2, section (d) defines "gross operating income" (which, as used in subd. 1, refers to income of those not under the supervision of the department, to which class submeterers and landlords belong) as including receipts for any "sale * * * made for ultimate consumption or use" or for "furnishing for such consumption or use * * * in this state." Thus it appears that the word "ultimate" is used in both cases.

Petitioner also points out that "§ 186-a is not the first law of this State imposing a tax upon the gross income of utilities engaged in the transportation business. It cites Section 184 of the Tax Law which imposes a franchise tax on transportation and transmission corporations and associations. That statute includes within "gross earnings" "earnings from transportation or transmission business originating and terminating within this state" but excludes "earnings derived from business of an interstate character." Petitioner argues that since section 186-a does not use the phrase "earnings derived from business originating and terminating within this state," section 186-a excepts this type of business from taxation.

We do not think it necessary to attempt to interpret section 186-a in the light of the language of section 184. It is not shown that the two sections are related in any way. Section 184 has been in force with frequent amendments since 1880. It imposes a franchise tax on corporations

doing a particular kind of business: transportation or transmission. Section 186-a, in force since 1937, imposes an emergency tax on a great number of different utility services. We think that the language of the latter is broad enough to include the kind of business in issue here, and that it was not necessary in a statute which was made applicable to such a wide field to use the specific words used in section 184 in relation to transportation corporations.

Even aside from the use of the word "ultimate," we do not agree with petitioner's assertion that the service it renders in this transportation is consumed or used partly within and partly without the State. The Appellate Division pointed that out clearly.

The second argument of petitioner is that, if the statute is construed to tax this kind of business, it should be construed to tax only that proportion of receipts attributable to mileage within this State. Its petition in the Supreme Court alleged that a construction of section 186-a which includes within gross income the total receipts for these trips is "contrary to statute and unconstitutional," but petitioner does not urge here that such construction is unconstitutional. It states that the question is not one of constitutional taxing power but of statutory construction. It relies upon Lehigh Valley Ry. *v.* Pennsylvania (145. U. S. 192); United States Express Co. *v.* Minnesota, 223 U. S. 335; and Hanley *v.* Kansas City So. Ry. Co. (187 U. S. 617) as indicating that the statute ought to be limited to receipts for mileage covered within this State. It should be noted here that the petitioner cites one case where the United States Supreme Court has held that a tax on tranportation originating and terminating in one State, but passing through another State, must be limited to receipts for mileage covered within the State of origin and terminus. In the Lehigh Valley case, the State court had upheld a tax imposed on a railroad corporation, based on receipts for continuous transportation beginning and ending in Pennsylvania but passing through New Jersey. It appears that only that portion of transportation which was within Pennsylvania was taxed. The railroad objected to the tax on the ground that the transportation was interstate

commerce. The question before the Supreme Court was "* * * simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

In State of Minnesota *v.* United States Express Co. (114 Minn. 346, 131 N. W. 489), a tax construed as a property tax was levied against the total transportation business done by defendant within the State. The Supreme Court of Minnesota held following the Lehigh case, that transportation originating and terminating in Minnesota but passing through another State was not interstate commerce. It then limited the tax, however, to the mileage within the State, saying: "This seems to us the safer rule and avoids any question of taxing interstate commerce * * *." When the case reached the United States Supreme Court it was affirmed (223 U. S. 335). It is not accurate to say that the Minnesota Court held that the Lehigh case required that the tax be limited to revenue from mileage within the State, and that the Supreme Court affirmed that holding. As in the Lehigh case, the appellant in the Supreme Court objected to the taxation of any of the transportation which originated and terminated in Minnesota but passed through another State, on the ground that that kind of business was interstate commerce. The Supreme Court cited the Lehigh case as controlling on this issue, not on the question of whether the tax should be prorated. It does not appear that the latter question was before the court.

Hanley *v.* Kansas City So. Ry. Co. (187 U. S. 617), cited by petitioner, is not applicable here, since it determined only that commerce extending from one State to another may not be regulated by either State; it specifically distinguished the Lehigh case as an example of State taxing power.

There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce

(Lehigh Valley case, supra; People ex. rel. Cornell Steamboat Co. *v.* Sohmer, U. S. 549; Ewing *v.* Leavenworth, 226 U. S. 464); and, since we think that this service is "service rendered for ultimate consumption or use by the purchaser in this state," we see no reason why the statute should be construed to limit the tax to receipts attributable to mileage covered within this State in the course of continuous transportation between points in this State.

The order should be affirmed with costs.

Loughran, Ch. J., Lewis, Desmond, Thacher and Fuld, JJ., concur; Dye, J., taking no part.

Order affirmed.

APPENDIX "B"

In the Matter of CENTRAL GREYHOUD LINES, INC., of New York, Petitioner, against CARROLL E. MEALEY et al., Constituting the State Tax Commission, Respondents.

Third Department, November 10, 1943.

Proceeding under article 78 of the Civil Practice Act (transferred to the Appellate Division of the Supreme Court in the third judicial department by an order of a Special Term, Albany County) to review a determination of respondents, constituting the State Tax Commission, denying revision of an assessment of additional taxes against petitioner under section 186-a of the Tax Law.

Bond, Schoeneck & King, attorneys (Lyle Hornbeck of counsel) for petitioner.

Nathaniel L. Goldstein, Attorney-General (Wendell P. Brown, First Assistant Attorney-General and John C. Crary, Jr., Assistant Attorney-General, of counsel), for respondents.

BLISS, J. The facts are undisputed. Petitioner, a New York corporation, is a utility engaged in the business of a common carrier by omnibus subject to the supervision of the New York State Department of Public Service. A portion of its business consists of transporting passengers from points in New York State to destinations in New York

State over routes which lie in part in an adjoining State or States.

Section 186-a of the Tax Law imposes an emergency tax equal to two per cent of its gross income upon every utility doing business in this State which is subject to the supervision of the State Department of Public Service, having an annual gross income in excess of $500. The words "gross income" are defined by this statute to "mean and include receipts received in or by reason of any sale * * * made or service rendered for ultimate consumption or use by the purchaser in this state * * *."

The petitioning utility contends first that its business of transporting passengers between termini, both of which are in New York State over routes which lie in part in an adjoining State or States, is not the rendering of service for ultimate consumption or use by the purchaser in this State. It argues further that if receipts from the sale of utility services for use partly within and partly without the State are taxable under section 186-a when the journey originates and terminates in New York State, then the tax must be limited to the revenue attributable to the mileage in New York State, otherwise the statute is unconstitutional and a violation of the interstate commerce provision of the Federal Constitution.

It is to be noted first that the emergency tax imposed by section 186-a is laid upon the utility for the privilege of doing business within New York State. It is measured by the gross income of the utility received in or by reason of any sale made or service rendered for ultimate consumption or use by the purchaser in this State. The tickets entitling the passengers for the journeys here in dispute are apparently all sold and payment therefor received within New York State. The journeys contracted for begin and end in this State. Similar journeys of freight or passengers have been held not to interstate commerce. (Lehigh Valley Railroad *v.* Pennsylvania, 145 U. S. 192; Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549.) It is a mere incident of continuous journey between two points in New York State if a portion of the journey happens to lie within an adjoining State. What the passenger desires

and the utility contracts to furnish is transportation from one point in New York State to another point in this State. His principal object is transportation between the termini. It is a matter of geography if physical or other reasons impel the utility to follow a route partly through another State. It is a service rendered to the purchaser in this State. If the journey were made in two or more distinct parts with definite interruptions in another State so that it composed two or more journeys instead of one, the situation would be quite different. The income received from the services here in question comes within the statutory definition of gross income.

In light of the Federal decisions we see no merit to the contention of petitioner that section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. (Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549; Lehigh Valley Railroad *v.* Pennsylvania, 145 U. S. 192.)

Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by its gross income. Consequently it is not a burden upon the particular business here sought to be exempted.

The determination should be in all respects confirmed, with fifty dollars costs and disbursements.

All concur.

Determination in all respects confirmed, with fifty dollars costs and disbursements.

APPENDIX "C"

Section 186-A of the New York State Tax Law

Emergency tax on the furnishing of utility services

(First enacted by Chapter 321 of Laws of 1937)

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to two per centum of its gross income for the period from July first, nineteen hun-

dred thirty-seven, to March thirty-first, nineteen hundred forty-four,* is hereby imposed upon every utility doing business in this state, which is subject to the supervision of the state department of public service which has a gross income for the twelve months ending May thirty first in excess of five hundred dollars, except motor carriers or brokers subject to such supervision under article three-b of the public service law and a tax equal to two per centum of its gross operating income is hereby imposed for the same period upon every other utility doing business in this state which has a gross operating income for the twelve months ending May thirty-first in excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a) the word "utility" includes every person subject to the supervision of either division of the state department of public service, except persons engaged in the business of operating or leasing sleeping and parlor railroad cars or of operating railroads other than street surface, rapid transit, subway and elevated railroads, and also includes every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water, refrigeration, telephony or telegraphy, delivered through mains, pipes, or wires, or furnishes gas, electric, steam, water, refrigerator, telephone or telegraph service, by means of mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets; (b) the word "person" means persons, corporations, companies, associations, joint-stock associations, co-partnerships, estates, assignee of rents, any person acting in a fiduciary capacity, or any other entity, and persons, their assignees, lessees, trustees or receivers, appointed by any court whatsoever, or by any other means, except the state, municipalities, political and civil subdivisions of the state or municipality, and public districts;

* The date was last extended by Chapter 110 of Laws of 1946 to March 31st, 1947.

(c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income), made or service rendered for ultimate consumption or use by the purchaser in this state, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit), without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, and royalties, derived from sources within this state other than such as are received from a corporation a majority of whose voting stock is owned by the taxpaying utility, without any deduction therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also profits from any transaction (except sales for resale and rentals) within this state whatsoever; and (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas, electricity, steam, water, refrigeration, telephony or telegraphy, or in or by reason of the furnishing for such consumption or use of gas, electric, steam, water, refrigerator, telephone or telegraph service in this state, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.

3. Every utility subject to tax under this section shall keep such records of its business and in such form as the tax commission may require, and such records shall be

preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

4. (See also subd. 4 below.) Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its return for such periods on June twenty-fifth, nineteen-hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundered forty-two, June twenty-fifth, nineteen hundred forty-three, and June twenty-fifth, nineteen hundred forty-four, respectively. The tax commission, in order to insure payment of the tax imposed by this section, may require at any time a return, which shall contain any data specified by it. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

4. (See also subd. 4 above.) Every utility subject to tax hereunder shall file, on or before September twenty-fifth, December twenty-fifth, March twenty-fifth, and June twenty-fifth, a return for the three calendar months preceding each such return date including any period for which the tax imposed hereby or by any amendment hereof

is effective, each of which returns shall state the gross income or gross operating income for the period covered by each such return. Returns shall be filed with the tax commission on a form to be furnished by it for such purpose and shall contain such other data, information or matter as the tax commission may require to be included therein. Notwithstanding the foregoing provisions of this subdivision, any utility whose average gross income or average gross operating income, as the case may be, for the aforesaid three months' periods is less than fifteen hundred dollars, may file its returns for such periods on June twenty-fifth, nineteen hundred thirty-nine, June twenty-fifth, nineteen hundred forty, June twenty-fifth, nineteen hundred forty-one, June twenty-fifth, nineteen hundred forty-two, and June twenty-fifth, nineteen hundred forty-three, respectively, and the tax commission may require any utility to file an annual return, which shall contain any data specified by it, regardless of whether the utility is subject to tax under this section. Every return shall have annexed thereto an affidavit of the head of the utility making the same, or of the owner or of a co-partner thereof, or of a principal officer of the corporation, if such business be conducted by a corporation, to the effect that the statements contained therein are true.

5. At the time of filing a return as required by this section, each utility shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed.

6. In case any return filed pursuant to this section shall be insufficient or unsatisfactory to the tax commission, and if a corrected or sufficient return is not filed within twenty days after the same is required by notice from the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as it is able to obtain, and, if necessary, may estimate the tax on the basis of external indices or otherwise. The tax commission shall give notice of such determination to the person liable for such tax. Such deter-

mination shall finally and irrevocably fix such tax, unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply to the tax commission for a hearing, or unless the tax commission, of its own motion shall reduce the same. After such hearing, the tax commission shall give notice of its decision to the person liable for the tax. The decision of the tax commission may be reviewed by certiorari, if application therefor is made within thirty days after the giving of notice of such decision. An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the tax commission and an undertaking filed with it, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that, if such order be dismissed or the tax confirmed, the applicant for the order will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding, or at the option of the applicant, such undertaking may be in a sum sufficient to cover the tax, penalties, costs and charges aforesaid, in which event the applicant shall not be required to pay such tax and penalties as a condition precedent to the granting of such order.

7. The same remedies shall be available for the recovery of any tax or penalty imposed by this section as are available for the recovery of other taxes and penalties imposed by this article.

8. Any notice authorized or required under the provisions of this section may be given by mailing the same to the person for whom it is intended, in a postpaid envelope, addressed to such person at the address given by him in the last return filed by him under this section, or, if no return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time, which is determined according to the provisions of this section by the giving of notice, shall commence to run from the date of mailing of such notice.

9. Any person failing to file a return or corrected return, or to pay any tax on any portion thereof, within the time required by this section shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof, excepting the first month, after such return was required to be filed or such tax became due; but the tax commission, if satisfied that the delay was excusable, may remit all or any portion of such penalty.

10. If, within one year from the payment of any tax or penalty, the payer thereof shall make application for a refund thereof and the tax commission or the court shall determine that such tax or penalty or any portion thereof was erroneously or illegally collected, the tax commission shall refund the amount so determined. For like cause and within the same period, a refund may be so made on the initiative of the tax commission. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the tax commission as hereinbefore provided unless the tax commission, after a hearing as hereinbefore provided, or of its own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal. All refunds shall be made out of moneys collected under this article deposited to the credit of the comptroller, with the approval of the comptroller. An application for a refund, made as hereinbefore provided, shall be deemed an application for the revision of any tax or penalty complained of and the tax commission may receive additional evidence with respect thereto. After making its determination, the tax commission shall give notice thereof to the person interested, and he shall be entitled to a certiorari order to review such determination, subject to the provisions hereinbefore contained relating to the granting of such an order.

11. If any provisions of this section conflicts with any other provision contained in this article, the provision of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall

apply with respect to the taxes under this section, so far as they are, or may be made applicable.

12. The tax imposed by this section shall be charged against and be paid by the utility and shall not be added as a separate item to bills rendered by the utility to customers or others but shall constitute a part of the operating costs of such utility.

13. Notwithstanding any other provision contained in this or any other law, in the event the city of New York shall enact a local law imposing a tax on utilities, such as is imposed by this section, except as to the rate of tax, the tax commission, in its discretion, may arrange with the chief fiscal officer of said city for the collection by him of the tax imposed by this section with respect to items that enter into the tax base for both the tax imposed by said city and that imposed pursuant to this section, and for the remittance by him of the tax imposed by this section to the tax commission for disposition as in this article provided. If such an arrangement be made, all the provisions of the local law of said city imposing the local tax shall apply with respect to the tax imposed by this section in the same manner as if the local tax rate had included the tax imposed by this section.

14. The remedy provided by this section for review of a decision of the tax commission shall be the exclusive remedy available to any taxpayer to judicially determine the liability of such taxpayer for taxes under this section. Added L. 1937, c. 321, Sec. 1; amended L. 1938, cc. 67, 293, 384, 710; L. 1939, c. 936, Sec. 1; L. 1940, c. 131, Sec. 1; L. 1940, c. 494; L. 1941, c. 137, Sec. 2; L. 1942, c. 168, Sec. 1; L. 1942, c. 780; L. 1943, c. 120, Sec. 1, eff. March 16, 1943; L. 1943, c. 260, eff. April 3, 1943; L. 1943, c. 424, Sec. 1, eff. April 13, 1943.